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No. 80-33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SMITTY BAKER COAL COMPANY INC.,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case

Petitioner, Smitty Baker Coal Company, Inc., sued the Respondent, United Mine Workers of America, for damages under the Labor Management Relations Act, including Section 301, 29 USC §185, and under Sections 1 and 2 of the Sherman Act, 15 USC §§ 1 and 2.

At trial Petitioner abandoned all actions other than that under the Sherman Act (1131a).[1] A jury trial resulted in a verdict against UMW for $1,250,000 (28a-30a).

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[1] References with the suffix "a" are to the Joint Appendix in the Court of Appeals; and with the suffix "App" are to the appendix to the Petition.

The District Court sustained UMW's motion for judgment NOV (53a) upon the ground that there "was no evidence of record upon which the jury could have reasonably found that the damages sustained by the plaintiff were in any way caused by the actions of the defendant taken pursuant to an illegal conspiracy" (80a). *Smitty Baker Coal Co.* v. *UMW,* 457 F.Supp. 1123, 1135 (W.D. Va. 1978)

Petitioner appealed. UMW cross-appealed—asserting error in the denial of judgment NOV on the conspiracy issue. The Court of Appeals affirmed the dismissal of the action. It held that the evidence did not sustain the verdict on the conspiracy issue and sustained the dismissal on the proximate cause issue for "the reasons stated by the district court in its detailed analysis of the evidence" (82 App.) *Smitty Baker Coal Co.* v. *UMW,* 620 F.2d 416, 438 (4th Cir., 1980)

B. Statement of Facts

1. Petitioner's Mining Operations and Labor Relations [2]

Under the heading "Facts Not In Dispute", Petitioner discusses its mining operations and its relationship with UMW but it has failed to state facts which are central to the decisions below and has misstated others.

Petitioner started its mining operations in 1969 with a capital of $100 on coal lands leased from Peabody Coal Company.[3] It became a party to the 1968 UMW Agreement and operated profitably thereunder until the strike of October 1, 1971, which gave rise to this case.

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[2] The facts set forth herein are more fully stated in the opinion of the Court of Appeals at pages 36-43 of the appendix to the Petition.

[3] Petitioner had after-tax profits of $9,968.12 for the year ending December 31, 1970, and after-tax profits of $36,104.38 for the year ending December 31, 1971. See 620 F.2d at 419.

Petitioner's general manager, Ralph Baker, testified that Peabody, itself a coal operator and a signatory to the 1968 Agreement, told him that he would have to sign a UMW agreement.[4] UMW Representative Clark said he called upon Baker at the request of union miners and was told by Baker that he intended to operate under the agreement. Baker was then doing preliminary work. Later Clark left a copy of the 1968 Agreement with Baker, which Baker signed on October 13, 1969 (100a, 905-906a).

The 1968 Agreement was subject to termination as of September 30, 1971. UMW gave notice of termination and negotiations with the Bituminous Coal Operators Association ("BCOA") ensued.[5] No agreement was reached and a strike of employees of signatory operators, including

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[4] The property leased to Petitioner was property available to Peabody for mining through its own employees. As a signatory to the 1968 Agreement, Peabody was bound by the following provision:

> "As a part of the consideration of this agreement, the operators signatory hereto agree that this agreement covers the operation of all of the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production or use. The operators agree that they will not lease, license or contract out any coal lands, coal producing or coal preparation facilities for the purpose of avoiding the application of this agreement or any section, paragraph or clause thereof" (1198a).

As the Court of Appeals noted (79 App), this provision in one form or another has been incorporated in every UMW contract when its inclusion was directed by the War Labor Board in 1943. (1023a).

[5] Since at least 1922, UMW has negotiated first with a basic group of operators, which has periodically changed in composition, and used the agreement reached as the basis for its demands upon others (1009a-1010a; 1082a-1084a). See Justice Goldberg's dissent in *Meat Cutters Union* v *Jewell Tea Co.* 381 US 676, 698 (1965).

Petitioner, commenced on October 1. The strike lasted until the 1971 Agreement was reached on November 13.

Baker testified he was not given a notice of termination (192a) and this action originally included a claim for breach of contract under 29 USC §185. As noted, however, this claim was withdrawn at trial. In any event, Baker knew the strike was coming. He asked Representative Clark if he could sign a stipulation for a retroactive adoption of any new agreement and work during the strike.[6] Clark said he could do "dead work" but not "run coal" (110a-111a; 194a). After the strike started, maintenance was performed for about a week. Then a picket line was established by the local union representing Petitioner's employees and those of other employees in the same hollow. The men then ceased work. Baker complained to Clark but Clark told him that he would not order anyone to cross the picket line (111a-113a, 194a). Shortly thereafter Baker wrote his 28 employees that they would be replaced if they did not return to work by November 10, but none did so (196a-197a).

On November 13 the 1971 Agreement was reached. Clark had attended the negotiations in New York and hurried back to Virginia because operators were calling to see when they could resume work (911a).

Petitioner states (Pet. p. 5) that on November 16, Baker refused to sign a stipulation presented by Clark that would have bound Petitioner to the Agreement and which would have ended the strike of his employees, because "he (Baker) had just the day before hired several Southern Labor Union employees . . . ." The Petitioner therein fails to state a very material fact. In fact what the Petitioner did on November 15 (Baker insisting he had not then heard of the new agreement—137a-138a, 202a) was to sign a three-

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[6] Apparently for this reason Petitioner insists it had no "labor dispute" with UMW (Petition, p. 3).

year contract with Southern Labor Union granting it exclusive recognition as bargaining agent, a union shop, a reduced welfare royalty and other provisions. He then hired 10 employees, including 3 of his foremen, who immediately began working and were producing coal on November 16 (118a, 123a, 913a). Baker met with Clark on November 16 but refused to sign the tendered stipulation, saying he "didn't think he could sign two contracts" (203a, 912a). Clark told Baker that his execution of the SLU was an unfair labor practice and UMW promptly filed such a charge with the NLRB [7] (942a).

In the course of the NLRB investigation SLU withdrew as bargaining agent for Petitioner's employees and UMW then withdrew its charge (133a-135a; 208a). Baker learned of this by a call (taken by Baker's wife) from the NLRB on December 13, and notified Peabody (140a). Peabody's Charles Selvey said he would meet with Baker and ask Clark to come. There had been no communication between Clark and Baker since Baker's refusal to sign the stipulation on November 16. (914a). Baker and Clark (with Selvey) then met on December 15. Clark offered Baker the 1971 Agreement but Baker said he was reluctant to sign without verification from the NLRB that the charge had been withdrawn. Clark called the NLRB by telephone and asked NLRB representative to talk with Baker. He did so and assured Baker that the charge had been withdrawn. Baker, however, continued his refusal to sign without formal notification, and the meeting ended (135a; 141a-142a; 208a-210a; 914a-916a).

On December 17, Baker met with his employees and told them that he had to return to work immediately or go

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[7] In the meantime local union pickets asked the new hires not to take their work. A fight started between a picket and a foreman but was broken up by other pickets. No other incidents occurred. The SLU employees never returned (125a-129a; 913a-914a; 960a-961a; 982a).

broke. Baker told them—no UMW representative was present—he would sign a stipulation to pay the union scale and benefits and then sign the agreement itself upon receipt of NLRB confirmation the charge had been withdrawn (135a; 209a-213a). UMW did not refuse to agree upon the stipulation as the Petitioner states (Pet. p. 5). Clark, however, learned of the meeting and called Baker to ask "just what he wanted." Clark went on to tell Baker that a stipulation would have to be cleared with UMW's area attorney. Clark arranged a meeting with Baker and the attorney on December 23, at which discussion centered on reopening the mines. In the meantime Baker told his employees that he was turning the matter over to attorneys (146a; 216a-217a; 918a).

After the December 23 meeting the parties' attorneys exchanged proposals by letters and in meetings. The Petitioner's attorney stated the Company could not afford to operate under the 1971 Agreement.[8] UMW's attorney asked to see Petitioner's books, which the Company refused to do, and went on to demand that UMW pay the Petitioner $75,000, which UMW refused to do (230a; 919a-920a; 944a-945a). UMW proposed resumption of work under the 1971 Agreement with a rider providing for renegotiation if the operation proved to be financially unfeasible for the Petitioner. Petitioner refused and countered with a proposal that the parties agree on the basis of the 1968 scale.

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[8] On cross-examination it was pointed out to Baker that as late as December 17, he had wanted a stipulation calling for the 1971 scale. Baker was asked why he, through his attorneys, was now proposing agreement on the basis of a materially lower wage. Baker said it was because UMW had not given him a stipulation by December 19, and that by the end of December "the attorneys had gotten into it, and they knew the Company was broke then" (212a). Asked if he was still trying to negotiate, Baker said, "No, I wasn't. My attorneys might have been."

The meeting thus ended. Three days later UMW wrote asking for another meeting but the Company did not reply, and no further negotiations took place (945a-946a; 949a et seq.).

On January 29, Baker's employees submitted an agreement for maintenance work. This agreement, which contemplated further negotiations, was signed by the local committee, the Petitioner and UMW (150a). Petitioner started work under this agreement. A rock fall was found and Baker told the employees that he was quitting (151a-152a). Baker testified it would have taken $50,000 to $75,000 to open the mines. He made no effort to borrow the money (222a-223a; 944a). He sold the equipment, netting $42,000, and opened a mine on another tract, signing a labor agreement with Southern Labor Union before he had any employees (219a; 427a).

2. The "Conspiracy" Evidence

In this aspect of the case Petitioner relies not on events that occurred in 1971 concurrent with the strike at Petitioner's mine, but principally on events and negotiations of the 1950's and early 1960's, and on statements that were made during that era and even before, by such legendary figures in the industry as John L. Lewis of the United Mine Workers, and operator representatives George Love and Joseph Moody. From this evidence Petitioner insists that there was a *tacit agreement* in 1971 between UMW and major operators—even, presumably, during UMW's six-week strike against those operators—whereby UMW would "impose" the agreement to be negotiated with BCOA operators on all other operators; and Petitioner contends, notwithstanding the events and negotiations at Petitioner's mine as related in Section 1 above, that UMW's insistence on that agreement resulted in its demise.

The evidence discloses no basis for the inference of such a tacit agreement. What UMW did, then uniquely mindful

by reason of this Court's *Pennington* and *Ramsey*[9] decisions of what a union could and could not do, was to insist of all operators (to the extent it insisted) upon a uniform wage, not as a matter of agreement with other operators, but as a matter of its internal policies.

UMW's policy calling for a uniform wage appears in evidence of adoption of numerous resolutions at conventions since before 1900 unto the present time (1058a-1061a). Undisputed evidence shows UMW's pursuit of a uniform wage in negotiations long pre-dated 1950, when Petitioner says the alleged conspiracy started, and its virtual accomplishment of the policy by the 1941 Agreement when the National Defense Mediation Board approved UMW's demand for the elimination of a then existing 40-cent North-South differential (442a-459a). It shows that historically UMW had first negotiated with a basic group of operators —generally those of a northern or central group such as BCOA but not always of the same composition—and that UMW had then utilized the agreement reached as the basis for its negotations with other groups (491a-493a; 1009a-1010a; 1027a-1028a; 1082a-1084a). The wages negotiated over the years have been consistent with the rates negotiated in the historically comparable automobile and steel industries (Def. Ex. 6, 1002a-1003a). The total increases negotiated at arms length from 1950 through the 1968 Agreements averaged slightly over 10 cents per hour per year for the 21-year period (1021a). The 1950's saw mechanization, but mechanization did not begin with that period and had never been opposed by UMW.

The realities of the period, moreover, must be seen in light of fundamental economic events of that time, to-wit, the elimination of traditional coal markets and the vast increase in the use of oil and gas as the primary sources of energy in the United States (1799a-1800a). Coal not only

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[9] These references are to *UMW* v. *Pennington*, 381 US 657 (1965) and *Ramsey* v. *UMW*, 401 US 302 (1971), respectively.

lost that position, its production declined from 630 million tons in 1947 to less than 400 million tons in the 1950's (1802a). Loss of markets and mechanization both contributed to the loss of employment in the industry.[10] UMW's alternatives were to accept a low wage and fight mechanization, or to accept mechanization and seek wages comparable with those in related industries. UMW pursued the latter course consistent with its longstanding policy.[11]

This evidence also emphasizes vital distinctions in this case and the *Pennington* type cases. Notably the latter arose at a time when the industry was in a depression, whereas by the early 1970's coal production, after more than 20 years curtailment, approached the levels of the post World War II period. And in contrast to the *Pennington* contention of inability to pay, here the Petitioner projected that it would have made millions had it operated under the UMW agreement (72-73 App).

The factual contrast of the instant case and *Pennington*

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[10] In an article, "The Great Employment Controversy," appearing in The Annals of the American Academy of Political and Social Science, March, 1962, pp. 46, 49-50, there appear the following employment trends: employment of production workers in the electrical industry declined from 925,000 in 1953 to 836,000 in February, 1961; in steel, although steel production and shipments in 1960 were identical with 1950, yet in 1960 production-worker employment averages 461,800, as compared with 540,000 in 1950; in automation and shift from airplanes to missiles 200,000 production jobs have been eliminated in the past few years, even though the industry's dollar volume has continued to rise; during the postwar period, railroad productivity rose by 65 percent while employment fell by 540,000.

[11] Petitioner offered evidence that during the 1950's UMW made substantial investments and loans with respect to West Kentucky Coal Company, which for years before had been operating its mines on a non-union basis, but no evidence that UMW suggested policies for its management. Moreover, the evidence shows UMW divested itself of its entire interest therein in 1963—eight years before the events in question (836a-842a).

type cases, however, is not limited to the profitability of mining operations under the UMW scale. Those cases stressed the existence of the Protective Wage Clause of the 1958 Agreement (PWC), which had been termed the "crux" of the conspiracy and which the Petitioner here characterizes (Pet. p. 14) as an explicit expression of a conspiratorial arrangement "previously evidenced only by their conduct." In fact the PWC had been proposed in 1958 by the UMW as a means of protecting its members from the consequences of subcontracting. Thus its Paragraph B requires that coal mined, produced, prepared, procured or acquired by signatory operators shall be mined under labor standards as favorable to employees as those in UMW's contract (628a-629a). In negotiating this agreement, operators sought, and UMW agreed to, a reciprocal commitment that UMW would enforce the Agreement *to all signatories thereto* equally. This resulted in PWC's Paragraph A.[12] There is evidence that the provision had no relationship to non-signatories or to any agreement on UMW's part that it impose any kind of contract on other operators, and that it was applicable only to signatories (1026a).[13] In any event, the Joint Industry Contract Committee (JICC), which had been established by PWC and which had submitted forms to signatory operators by which they were to

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[12] Paragraph A is set forth in the opinion of the Court of Appeals at 53 App.

[13] The Courts in the non-jury cases (*Ramsey* and *Pennington*) have agreed with UMW's interpretation of PWC. In the jury cases, including the instant case, the issue of whether PWC bound UMW to seek its standard agreement was submitted to the jury on the theory PWC was ambiguous. See *Tennessee Consolidated Coal Company* v. *UMW*, 416 F.2d (1969). The issue has not been considered by the Supreme Court. In the dissenting opinion in *Ramsey*, 401 U.S. 302, at 316, Justice Douglas remarked, with Justices Black, Harlan and Marshall concurring, "... there is not a word in the agreement, as I read it, that covers non-signatory operators."

certify their compliance with the agreement and had dealt with signatories who had failed to comply, suspended further enforcement of PWC by November, 1959, because of uncertainties resulting from the then recent enactment of the Labor-Management Reporting Disclosure Act of 1959, 29 USC § 401. And, at its March 31, 1964, meeting, it appearing PWC had been deleted from the newly negotiated 1964 Agreement, the commttee proceeded to dissolve itself (Pet. Ex. 51, 1548a et seq.).

The elimination of PWC from the agreement was accomplished by the 1964 Agreement which did not carry forward the provision. It therefore ceased to exist. In the Court of Appeals, however, Petitioner urged that UMW and the operators had "used" language "to make it possible for them to claim later, if they should get in trouble, that they had taken PWC out of the Contract. . . ." (Pet.'s Brief in the Court of Appeals, p. 33). While Petitioner no longer appears to advance that contention, it contends the "80-Cent Clause"[14] and the "Application of Contract to Coal

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[14] The 80-Cent Clause first appeared in the 1964 Agreement and reads as follows (722a):

> "During the life of this agreement there shall be paid into such Fund by each Operator signatory hereto the sum of forty cents ($0.40) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal produced or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory operator) there shall, during the life of this Agreement, be paid into such Fund by each Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents ($0.80) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so produced or acquired on which the aforesaid sum of forty cents ($0.40) per ton had not been paid into said Fund prior to such procurement or acquisition."

As previously noted, the Coal Lands clause, in one form or another, had been in the Agreement since the War Labor Board decision in 1943.

Lands" (see p. 3, fn. 4) reflect a tacit agreement between UMW and major operators that UMW had agreed to "impose" the agreement on all other operators. Neither provision, however, contains language that can be construed as creating such an obligation or from which such an inference may be drawn and, indeed, both relate to obligations of signatory operators not to subvert the agreement, and not to obligations of UMW.

The Court of Appeals noted that the case of *Solar Fuels Company* v. *UMW*, 346 F.2d 789 at 794-5 (3rd Cir., 1973), cert. denied, 416 U.S. 909 (1974), held that since PWC was not expressly repudiated in the 1964 Agreement, it remained in effect (73 App). The Court of Appeals correctly went on to note that in the 1968 Agreement (and in the 1971 Agreement) there was an express recision of any prior protective wage clause or any related obligation.[15] The Petitioner claims nevertheless, there was no express recision of PWC and that the language of the 1968 Agreement somehow related only to pre-1950 contract provisions. The language itself, as well as the history of problems attending PWC during the 1950's and earlier 1960's, precludes such an interpretation or any inference of the tacit agreement asserted by the Petitioner.

SUMMARY OF ARGUMENT

Petitioner presents essentially three questions: (1) whether, as the Court of Appeals held, the Petitioner failed to adduce sufficient proof of an antitrust violation to per-

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[15] The provision is found under the heading of "Miscellaneous" in the 1968 Agreement, and is as follows:

> "Any and all provisions of any contracts or agreements between the parties hereto or some of them whether national, district, local or otherwise providing for a protective wage clause and a modification of this agreement or said agreements if a more favorable wage agreement is entered into by the United Mine Workers of America, are hereby rescinded, cancelled, abrogated and made null and void."

mit the submission of such issue to the jury; (2) whether both the District Court and the Court of Appeals, upon a review of the facts peculiar to this case, correctly concluded the damages claimed by Petitioner were not the proximate result of the claimed conspiracy; and (3) whether the courts invaded the province of the jury in violation of the Seventh Amendment.

Respondent contends that the Court of Appeals correctly granted judgment NOV on the antitrust issue for a number of reasons. It correctly held that an anti-competitive purpose was an essential element of a *Pennington* type action and that there was no evidence of such a purpose in this record. It also correctly held that as of the time of the 1968 and 1971 UMW Agreements, there was no evidence by which an express or tacit agreement could be found that UMW had agreed with one group of operators that it would impose a uniform agreement upon all other operators.

Both lower courts properly held that there was no evidence from which it could be found that the damages claimed by the Petitioner were the proximate result of the alleged conspiracy. The Petitioner had operated profitably under the UMW agreement and projected enormous future earnings under the terms of the agreement. The damages Petitioner projected resulted from its refusal to bargain with UMW because of its patently illegal execution of a collective bargaining agreement with a rival union. Two courts have reviewed the record and both have found that there was no evidence establishing that Petitioner's claimed damages were proximately caused by UMW.

The lower courts did not invade the province of the jury in violation of the Seventh Amendment. The standards employed by the District Court and the Court of Appeals in considering UMW's motion for judgment NOV were the correct standards for evaluating such a motion.

ARGUMENT

A. The Court of Appeals Has Correctly Construed Pennington and Related Decisions; and it Has Correctly Applied Those Decisions to the Facts of This Case.

The Court of Appeals concluded that "this case is simply not a *Pennington* type case at all. It satisfies none of the criteria for such a case." (73 App).

The Court of Appeals found no evidence from which an anti-competitive purpose or agreement could be attributed to UMW; and it found no evidence of a UMW-operator agreement by which UMW agreed that it would insist upon a particular agreement in its negotiations with other operators.

Evidence of such an agreement is, of course, essential to a *Pennington* type action. That a union seeks a uniform agreement with all employers, including those not represented in the initial negotiations, is not evidence of a conspiracy, for as this Court made clear in *Pennington* and reaffirmed in *Ramsey,* a union has the right to do so as a matter of its own policy. It forfeits its antitrust exemption only when it agrees with one employer group that it will insist upon the agreement reached in negotiations with other operators.

The finding that no such agreement existed was based upon a consideration of the whole of the evidence. This included the elimination of the PWC in 1964 and the express recision of PWC and even "favored nation" concepts in 1968. In short, and without repeating the so-called consipracy evidence summarized above, the Court found that by 1971 there was nothing from which a "straitjacket" agreement may be inferred.[16]

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[16] In this regard the Court of Appeals aptly noted that UMW, in its negotiations with Petitioner, offered a rider by which, if Petitioner was unable to operate under the 1971 Agreement, it would have agreed to enter into further wage negotiations (75 App).

Petitioner seeks to avoid this by the contention it abandoned at trial relating to the alleged failure by UMW to give notice of termination of the 1968 Agreement. The argument is without merit. The point is irrelevant to the antitrust issue. UMW had the contractual right to terminate the agreement. Its alleged failure to do so, coupled with a strike on a "no contract no work" basis, while affording a possible ground for a breach of contract action, can hardly be elevated into an antitrust violation.

Petitioner also urges that the existence in the agreement of the 80-Cent Clause and the Coal Lands clause provides a basis for a jury inference of an illegal tacit agreement to impose the same agreement on all employers. This argument is likewise without merit. Both provisions singularly require obligations of the operators by which they are not to avoid their responsibilities to *their* employees. Both provisions are designed to preserve the work opportunities of UMW members by restricting the ability of a signatory operator to side step his obligations by the utilization of low wage operators of whatever disguise. This was Peabody's obligation under the then long standing Coal Lands clause.

There was no "top down" bargaining. *Connell Co.* v. *Plumbers and Steamfitters,* 421 U.S. 616 (1975), which involved a restraint outside the context of a collective bargaining relationship, has no application in this case. As the Court of Appeals said of the Coal Lands Clause, it was intended to do nothing other than "protect the legitimate interests of the Union." (80 app.) Neither the 80 cent clause nor the Coal Lands clause restricts UMW in its relationship with other operators. Neither clause is "tainted by any requirement which would limit the rights of the Union in its bargaining with other parties." (80 app.)

Considered alone, or in context with the whole of the

evidence, including the recision of the provisions which *Pennington* type plaintiffs once contended was such an agreement, it is clear that the 1968 and 1971 Agreements afford no basis for the inference of an illegal tacit agreement, as the Court of Appeals held.

Petitioner claims that the Court of Appeals misconstrued *UMW* v. *Pennington,* 381 U.S. 657 (1965) and *Ramsey* v. *UMW,* 401 U.S. 302 (1971) with regard to the factor of predatory intent. Specifically, it is Petitioner's contention that the lower court ". . . established a standard of predatory intent to accomplish absolute ruin as a prerequisite to union liability under Section 4 of the Clayton Act." (Petitioner's brief, p. 27.) This contention is incorrect.

The Court of Appeals held that ". . . it is not enough that the Union may have entered into a contract with a multi-employer unit in a national industry to establish an antitrust violation by the Union or, for that matter, the employer-group", 620 F. 2d at 431. Such a conclusion is obviously accurate. Bargaining on a multi-employer basis is lawful. *NLRB* v. *Truck Drivers, Local 449* [*Buffalo Linen*], 353 U.S. 87 (1957). "To amount to an antitrust violation", the Fourth Circuit said, "the agreement must be rooted in an anti-competitive purpose, and must effect an anti-competitive result, as evidenced by action 'ruining' a competitor's business or driving him 'out of business'. Unless there is such an agreement between the labor organization and the non-labor group and such an anti-competitive result, there is no conspiracy actionable under the antitrust laws." 620 F. 2d 431-32.

This analysis is correct. As the Court of Appeals said, *Pennington* and *Ramsey* stand for the proposition that ". . . for an agreement between the Union and the multi-employer group to constitute an antitrust violation it must arise out of a predatory intent, however it is described, whether, as Mr. Justice Douglas said, 'to do in one or more competitors,' or as Mr. Justice White said 'with the purpose

and effect of driving the small marginal operators out of business' or, as the plaintiff itself has expressed it, 'with the purpose to eliminate competitors,' or, again as Mr. Justice White has said, where the wage scales demanded are 'ruinous to the business of the other employers.' " It is thus clear that the Fourth Circuit was using the term predatory intent as shorthand for anti-competitive purpose.

The analysis of the Fourth Circuit on this issue is also in accord with the decisions of lower courts and with the views expressed by commentators on the *Pennington* and *Ramsey* cases. See, e.g., the cases and other authorities listed in footnote 46 of the Court of Appeals' opinion, 620 F. 2d at 433, n. 46.

Furthermore, to repeat what the Court of Appeals said, this is not a *Pennington*-type case at all. In those cases the plaintiffs' claims were based on the premise that they were unable to meet the terms of the UMW contract that was allegedly imposed upon them. Here, in contrast, "[t]he record . . . is completely devoid of any evidence to support any such premise in this case. In fact, the evidence conclusively demonstrates the contrary". 620 F. 2d at 433. Thus, as the Court of Appeals points out, the Petitioner operated at a profit under the 1968 Agreement; used the 1968 and 1971 Agreements as the basis for projecting that it would have made substantial if not exorbitant profits in the future; and offered to become bound by the 1971 Agreement even before it knew what the terms of that agreement would be.

It is true, as the lower court said, that late in the negotiations Petitioner contended for the first time that it was unable to meet the 1971 Agreement. But Petitioner offered no evidence in support of this belated contention and in fact refused UMW's legitimate request to examine its records in order to evaluate the claim of financial inability.

The Court of Appeals, properly granted judgment NOV on the antitrust issue.

B. The Lower Courts Correctly Held that the Record Contains No Evidence from Which the Jury Could Have Concluded that Petitioner's Claimed Damage was Proximately Caused by the Conspiracy

To recover damages in an antitrust action a plaintiff must show not only a violation of the antitrust laws but also that the violation of those laws was a material cause of the claimed injury—i.e., that the injury was "by reason of" the violation. *Zenith Radio Corp.* v. *Haseltine Research, Inc.*, 395 U.S. 100, 114 N. 9 (1969); *Comfort Trane Air Conditioning* v. *Trane Co.*, 592 F. 2d 1373, 1383 (5th Cir. 1979). It is not necessary, as the District Court said, for petitioner to ". . . have established that the illegal actions of defendant were the only cause, or even the most substantial cause of its injuries. Yet, [Petitioner] must offer sufficient proof that defendant's illegal conduct materially contributed to the injury", 457 F. Supp. at 1131. Applying these standards, the lower courts correctly concluded that there was no evidence to support the conclusion that Petitioner's damages were proximately caused by an antitrust violation.

Petitioner cannot claim that UMW's 1968 Agreement was so burdensome as to damage or ruin its business for, as the Court found, the record shows without dispute that Petitioner earned a profit during the two year period that it operated under that contract. The same is true of the 1971 Agreement. Even before the 1971 Agreement had been negotiated, Petitioner offered to be bound by its terms if UMW would agree in return to allow its mine to operate during the national strike.[17] Furthermore, Petitioner's

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[17] UMW declined this offer, because of its policy of "no contract, no work" and as the District Court found, "[t]he strike was uniformly enforced as to all employment units organized by the UMW, large and small alike". Thus, as the Court went on to say, Petitioner ". . . can scarcely be heard to argue that the UMW's refusal to allow [Petitioner] to continue to operate, under a mere

damage claim was itself based on the premise that Petitioner could have made even greater profits than before had it been allowed to operate during the national strike, and thereafter, under either the 1968 or the 1971 Agreements. These undisputed facts establish beyond doubt that UMW's national contracts were not harmful, let alone ruinous, to Petitioner's business.

Clearly, as the District Court held, ". . . the only conclusion that reasonable men could have reached was that [Petitioner's] damages and financial failure were caused by the chain of events initiated by [Petitioner's] general manager's adoption of the Southern Labor Union contract", 457 F. Supp. at 1134. This chain of events began on November 15, 1971, when, under highly irregular circumstances, discussed supra, pp. 5-7, Petitioner signed a collective bargaining agreement with the Southern Labor Union (SLU) and with ten replacements began to mine coal.[18] This occurred just two days after UMW and BCOA had negotiated the 1971 Agreements.

That the lower courts were correct in holding that the execution of the SLU contract caused Petitioner's damages is borne out by the undisputed proof relating to what occurred on and after November 15, 1971.

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stipulation to be bound retroactively to the new agreement, was a manifestation of a conspiracy to drive small operators out of business. The integrity of a nationwide industrial strike could not be maintained if such variations were allowed to prevail''. 457 F. Supp. 1133.

[18] As noted by the Court of Appeals (40 App., ftnt. 6), the signing of the SLU contract was irregular for at least two reasons. First, Petitioner's striking employees were represented by UMW. And, second, Petitioner recognized SLU as the representative of its employees, and signed the SLU contract, solely on the basis of 10 authorization cards—3 of which had been signed by supervisors. See *Terrell Machine Company* v. *NLRB* (4th Cir. 1970) 427 F. 2d 1088, cert. den. 298 U.S. 929; *NLRB* v. *Trosch* (4th Cir. 1963) 321 F. 2d 692, 695, cert. den. 375 U.S. 993 (1964).

On November 16, 1971, Petitioner refused UMW's request to sign the new agreement. Petitioner did not refuse because the terms of the 1971 Agreement were ruinous or burdensome. On the contrary, Petitioner's refusal was based solely on its position that the SLU contract precluded it from dealing further with UMW. (We note again that Petitioner does not so much as mention the SLU contract or its refusal to bargain by reason thereof.) As a result, the strike continued and UMW filed a charge with the NLRB alleging that Petitioner had committed an unfair labor practice by executing the SLU contract. No further negotiations occurred while these charges were pending.

On December 13, 1971, the NLRB informed Petitioner that SLU had abandoned its claim as bargaining agent for its employees and that UMWA had withdrawn its unfair labor practice charges. But Petitioner still refused to sign the UMW contract. As before, Petitioner took no exception to the contract itself. At this point, Petitioner merely said it was unwilling to sign the UMW agreement until it had received *official* notice from the NLRB that the charges had been withdrawn. Petitioner did say, however, that it was willing to sign a stipulation under which it would agree to pay the wage scale in the 1971 Agreement pending receipt of official confirmation from the NLRB.

The parties met again in January, 1972. Having recently hired the attorneys who handled *Pennington* and other antitrust cases against UMW, Petitioner then claimed for the first time that it could not pay the wage scale or the benefit package in the new UMW agreement. UMW asked to see Petitioner's books in order to assess this new position, but Petitioner refused this request.[19] UMW in turn proposed that Petitioner resume operations under the 1971

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[19] As the Court of Appeals noted, Petitioner had an obligation under these circumstances to honor UMW's request to produce its records. *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956)

Agreement, but with the understanding that the Agreement would be renegotiated if it developed that Petitioner could not afford to operate under its terms. Petitioner rejected this proposal as well and in response offered as a counter-proposal the terms of the then expired 1968 Agreement under which its employees had worked prior to the strike. Although it found this counterproposal unacceptable, UMW nevertheless requested that the parties have another meeting. UMW's request for further negotiations was never answered.

Shortly thereafter it was discovered that Petitioner's mines would require substantial repairs in order to put them in working condition and at this point Petitioner chose to abandon the operation and liquidate its assets.

The dispositive issue of causation turns on facts which are peculiar to this case. Two courts have already reviewed those facts and both have concluded that the record contains no evidence from which the jury could have concluded that Petitioner's damages were proximately caused by a violation of the antitrust law.

Since the evidence relating to causation has already been reviewed twice, and since it is not the practice of this Court to grant certiorari in order to ". . . review evidence and discuss specific facts," *U.S.* v. *Johnston,* 268 U.S. 220, 227 (1925); *Rogers* v. *Missouri Pacific R. Co.,* 352 U.S. 500, 537 (1957) (dissenting opinion, Justice Frankfurter), UMW believes the petition should be denied for this reason alone.

Furthermore, given these facts, all of which are undisputed, there can be no doubt that the lower courts were correct in holding that such damages as Petitioner sustained were caused solely by its adoption of the SLU contract and, conversely, that there is no evidence from which it can be found that the damages were caused by an

antitrust violation.[20] Indeed, as the District Court found, there was no evidence of record ". . . from which the jury could have possibly found that the illegal conspiracy was even a partial cause of [Petitioner's] losses", 457 F. Supp. at 1134. Hence, Petitioner failed to meet the requirement of *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931), that damages must be the "certain result of the wrong".

C. Petitioner's Contenion That the Lower Courts "Invaded" the Province of the Jury in Violation of the Seventh Amendment Fails to Raise a Constitutional Question and is Plainly Without Merit

Neither the District Court nor the Court of Appeals "invaded" the province of the jury in passing upon UMW's motion for judgment NOV. The standards employed by the District Court, 457 F.Supp. at 1130-31, and adopted by the Court of Appeals, 620 F.2d at 438, are the correct standards for evaluating a motion for judgment NOV. See *5A Moore's Federal Practice,* ¶ 50.07[2]. Both courts were ". . . conscious of the limitations on [their] power, and conscientious and objective in its exercise." *Manaia* v. *Potomac Electric Power,* 268 F.2d 793, 799 (4th Cir, 1959) Cert. denied, 361 U.S. 913 (1959).

Citing *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962), Petitioner contends that the lower courts compartmentalized the various components of the proof and wiped the slate clean after scrutiny of

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[20] The lower courts were also correct, as a matter of law, in rejecting Petitioner's theory that but for its having been required to sign the 1968 Agreement, it would never have become involved in the strike that occurred in 1971. Such a theory is "utterly fantastic", as the District Court said, 457 F. Supp. at 1134, for if such a theory were to prevail, UMW "would become the insurer of the financial success of every small operator who performs under the national contract." *Id.*

each. The decisions themselves show that this contention is manifestly incorrect. For example, in the analysis of the causation issue, which the Court of Appeals adopted, the District Court discussed and correctly applied the relevant authorities, including *Continental Ore* and *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), and after doing so gave Petitioner the full benefit of its proof. Indeed, as the decisions show, the lower courts reached the conclusion that there was no evidence upon which the jury could have found that Petitioner's damages were caused by UMW only after "[c]onsidering all the evidence in its totality," 457 F.Supp. at 1134. The same is true of the Fourth Circuit's analysis of the conspiracy issue. Both courts considered the evidence in its totality. It would be difficult to find decisions that more carefully observe the principles set forth in *Continental Ore.*

It is true, of course, that in reviewing the record in order to pass upon UMW's motion, the lower courts made a point-by-point analysis of Petitioner's theories and the evidence introduced in support of them. But such an analysis is neither inappropriate nor in conflict with *Continental Ore.* The process used by a court in passing upon a motion for judgment NOV is analytical, not intuitive, and it is hard to imagine how the explication of such an analysis can be accomplished other than by a point-by-point discussion. The evidence either contains evidence from which a conspiracy can be found or it does not. The same is true with regard to the causation. The only rational way of resolving such issues is by means of an analysis like that used by the lower courts in this case.

Just as the courts below did not "invade" the province of the jury in granting UMW's motion for judgment NOV, so too is it clear that their action did not violate Petitioner's rights under the Seventh Amendment. Petitioner's reliance upon the Seventh Amendment ". . . merely seeks an obscuring injection of the linguistics of constitutional

principle into the familiar process of appraisal of evidence and its associated inferences." *Manaia* v. *Potomac Electric Company, supra,* at 799. "The attempt, therefore, to glamorize the problem by an invocation of the Seventh Amendment is, at best, an irrelevance contributing nothing to the objective disposition of such questions as this." *Id.* at 799.

As Justice Frankfurter said, in his dissenting opinion in *Dick* v. *New York Life Insurance Co.,* 359 U.S. 437, 455-56, (1959), "Fabulous invention cannot turn these conventional motions [i.e., motions for directed and for judgment NOV] turning on the appreciation of evidence into constitutional issues . . . This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence." See also *Smith* v. *Reinauer Oil Transport,* 256 F.2d 646, 649 (1st Cir, 1958).[21]

After carefully reviewing the entire record in this case, two courts have concluded that the record contained no evidence to support the contention that Petitioner was damaged by an antitrust violation. This review led the Court of Appeals to reach the same conclusion with regard to the conspiracy issue as well. UMW contends that in passing on its motion for judgment NOV the courts below did not invade the province of the jury in violation of the Seventh Amendment and that the conclusions reached by the Court of Appeals were in all respects correct.

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[21] Justice Frankfurter did not make the statement attributed to him on page 31 of Petitioner's brief, either in *Dick* v. *New York Life Insurance Co.,* supra, or in any other case. Indeed, Justice Frankfurter was of the view that motions for judgment NOV do not raise constitutional issues. The quotation on page 31 of Petitioner's brief actually comes from *Manaia* v. *Potomac Electric Power Co.,* supra, at 799. It is, moreover, taken out of context since *Manaia* stands for a proposition diametrically opposed to the one for which it is cited.

CONCLUSION

For the foregoing reasons it is submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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